A **AHMAD SABRI ABU HASSAN v. MAYBANK ISLAMIC BHD**

HIGH COURT MALAYA, GEORGETOWN
LIM CHONG FONG JC
[CIVIL APPEAL NO: 12A-49-11-2015]
28 APRIL 2016

B

CIVIL PROCEDURE: *Appeal – Record of appeal – Filing of record of appeal one month after filing of notice of appeal – Failure to apply for extension of time – Whether fatal to appeal – Whether curable under O. 1A of Rules of Court 2012*

C ***CIVIL PROCEDURE:*** *Appeal – Notice of appeal – Amendment of – Without leave of court – Whether contents inserted without leave to be expunged*

CIVIL PROCEDURE: *Judgment and orders – Judgment in default – Setting aside – Whether judgment in default regularly obtained – Whether appellant had meritorious defence – Whether contract was a nullity – Whether writ properly served* D *– Rules of Court 2012, O. 10 r. 3(b)*

The first defendant, Iltizam Kukuh Enterprise ('Iltizam') obtained a hire purchase facility for the purchase of a truck from the respondent and entered into a hire purchase agreement accordingly. The hire purchase facility was guaranteed by the appellant and the third defendant in the suit. However, E Iltizam defaulted in the instalment payments resulting in the action against Iltizam and the guarantors. Judgment in default of appearance was entered against the appellant. This was the appellant's appeal against the decision of the Senior Assistant Registrar in refusing to set aside the default judgment. The grounds raised by the appellant were: (i) the default judgment had been F irregularly obtained as the writ was not properly served by the respondent pursuant to O. 10 r. 3(1)(b) of the Rules of Court 2012 ('ROC'); (ii) even if the default judgment was regularly obtained, there were merits in the appellant's defence that warranted the judgment to be set aside; and (iii) the respondent did not execute the hire purchase agreement in breach of G cl. 22 and therefore was a nullity. The appeal was essentially a re-hearing subject to the provisions of O. 55 r. 5 of the ROC. The respondent raised two preliminary objections that the appeal was incompetent on the grounds that (i) the appellant to file the appeal record within a month from filing of the notice of appeal; and (ii) the notice of appeal was amended without the leave of the court.

H

Held (dismissing appeal with costs):

(1) It is mandatory requirement for the appellant to make an application for the extension of time to regularise the late filing and service of his record of appeal. Order 1A of the ROC could not be utilised to excuse the I appellant in the absence of an application for an extension of time to file the record of appeal. Order 1A deals with situations of non-compliances where no specific remedy is provided in the ROC. The failure to apply

for an extension of time was fatal to the appeal and could not be saved by O. 1A. The consequence for further amending the notice of appeal without the leave of appeal would be to expunge the contents in the notice of appeal that had been inserted without leave. Consequently, the preliminary objections were upheld. (paras 20, 22, 23 & 24)

(2) The common sense approach and purposive construction of cl. 8 of the guarantee agreement encompassed the service of legal process. The address for service contractually provided would be extended to other relevant documents, including originating summons and cause papers. The respondent sent the writ by pre-paid registered post to the last known address of the appellant as indicated in the letter sent by the appellant to the respondent. In the circumstances, the writ was properly served and the default judgment was regularly obtained. (paras 27 & 28)

(3) The court took judicial notice that the respondent was one of the biggest commercial banks in the country which had Islamic banking licenses issued by the Ministry of Finance to transact in Islamic banking services. The appellant's contention that the hire purchase facility was non-Syariah compliant for incomplete documentation was a bare allegation without expert opinion in Islamic finance. The appellant's contention was therefore hollow and plainly inadequate to demonstrate that he had a meritorious defence. (paras 30 & 31)

(4) Notwithstanding that the respondent had not executed the hire purchase agreement, it had been performed and Iltizam had enjoyed the benefit of the hire purchase facility. The legal consequence was that the respondent had waived the provision designed to protect its interest. (para 33)

Case(s) referred to:

Abd Hamid Jaafar v. Shamsiah Dan Keluarga Sdn Bhd [2004] 5 CLJ 381 HC ***(dist)***

Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat [1978] 1 LNS 15 FC ***(refd)***

Cergas Tegas Sdn Bhd (In Liquidation) v. SAP Holdings Sdn Bhd & Anor [2013] 8 CLJ 745 CA ***(refd)***

CIMB Islamic Bank Bhd v. Tengku Kamarul Zaman [2011] 1 LNS 1539 HC ***(refd)***

Evans v. Bartlam [1937] AC 473 ***(refd)***

Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor [2001] 4 CLJ 1 CA ***(refd)***

Kemajuan Hunda Kredit (Kuching) Sdn Bhd v. Titus Chuo Mui Ing [1995] 2 CLJ 102 HC ***(dist)***

Kerajaan Negeri Pahang Darul Makmur & Anor v. Seruan Gemilang Makmur Sdn Bhd [2008] 6 CLJ 611 CA ***(refd)***

Nikodo (S) Pte Ltd v. GVC Karaoke Sdn Bhd [1997] 2 CLJ 906 HC ***(refd)***

Noraini Abu Bakar v. Amislamic Bank Bhd; Oh Siew Kuen (Third Party) [2015] 1 LNS 1155 CA ***(foll)***

PL Construction Sdn Bhd v. Abdullah Said [1988] 2 CLJ 808; [1988] 2 CLJ (Rep) 91 HC ***(refd)***

Re MTD Infraperdana Bhd [2003] 7 CLJ 108 HC ***(dist)***

Siow Fook Keong v. Lim Ean Chye [2015] 1 LNS 8 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 1A, O. 3 r. 5, O. 10 r. 3(1)(b), O. 55 r. 5(3)

For the appellant - Ahmad Taufiq Baharum; M/s Abdul Halim Said & Co
For the respondent - Amir Abu Bakar; M/s Shukor & Co

[Editor's note: Appeal from Sessions Court; Suit No: 52A-55-01-2013]

Reported by S Barathi

JUDGMENT

Lim Chong Fong JC:

Introduction

[1] This is an appeal brought by the appellant against the decision of the Senior Assistant Registrar of the Georgetown Sessions Court dated 11 November 2015 for refusing to set aside the default judgment entered by the respondent against the appellant on 27 February 2015 in Sessions Court Suit No: 52A-55-01-2013 ("suit").

[2] The appellant is the second defendant in that suit brought by the respondent/plaintiff against the appellant and two other defendants.

[3] This appeal is essentially a re-hearing subject to the provisions of O. 55 r. 5 of the Rules of Court 2012; see also *Nikodo (S) Pte Ltd v. GVC Karaoke Sdn Bhd* [1997] 2 CLJ 906; [1997] 2 MLJ 742.

[4] I heard the appeal on 4 and 22 March 2015 and thereafter adjourned the matter for consideration.

[5] This is my decision and grounds in support thereof.

Salient Facts

[6] The first defendant in the suit, Iltizam Kukuh Enterprise obtained a hire purchase facility for the purchase a Hino FR1K truck from the respondent. This facility is based on the Syariah concept of *Al-Ijrah Thumma Al-Bai*. The parties entered into a hire purchase agreement dated 23 September 2009 ("hire purchase agreement").

[7] The aforesaid hire purchase facility has been guaranteed by the appellant and the third defendant in the suit. Both guarantors executed a guarantee of hire purchase agreement dated 23 September 2009 ("guarantee").

[8] Subsequently, there was a variation made to the hire purchase agreement between Iltizam Kukuh Enterprise and the respondent and in this regard, they entered into the variation agreement dated 22 March 2011 and Aqad for Variation Aitab Agreement dated 23 March 2011.

[9] Consequently, both guarantors also individually executed a memorandum by guarantor dated 22 March 2011.

[10] By reason of Iltizam Kukuh Enterprise's failure to pay the required instalment payments pursuant to the hire purchase agreement, the respondent commenced the suit against Iltizam Kukuh Enterprise and the guarantors.

[11] Judgment in default of appearance was entered against the appellant on 27 February 2015.

Preliminary Objections

[12] The respondent raised two preliminary objections that this appeal is incompetent by reason that the appellant failed to file its record of appeal within a month from the filing of the notice of appeal as well as that the notice of appeal was amended without leave of the court.

[13] As for the first objection, it is clear from O. 55 r. 5(3) of the Rules of Court 2012 that the record of appeal must be filed within a month from the filing of the notice of appeal. In *Siow Fook Keong v. Lim Ean Chye* [2015] 1 LNS 8, Teo Say Eng J held as follows:

> 2.3. First and foremost, I must stress that the Rules of Court 2012 are to be obeyed and not to be broken. I agree that there are a plethora of authorities which rule that the word 'shall' when used in any legislation means 'obligatory' or 'mandatory' and it should not be treated as ornament to the legislation and devoid of any meaning. The importance of the Rules of Court cannot be ignored as otherwise the Court will be faced with endless problems involving the administration of justice: see *Yu Oi Yong & Anor v. Ho Toong Peng & Ors* [1976] 1 LNS 174; [1977] 1 MLJ 120 and *Chua Choong Yin v. Tan Boon Bak Trading Sdn Bhd & Anor* [2002] 3 CLJ 357.
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> In the case before me, I find that the 1st serious breach was committed when the memorandum of appeal was filed as a separate document which cannot be regarded as part of the record of appeal. Furthermore, the memorandum of appeal was filed on 25.8.2014 that is, one month after the filing of the supplemental record of appeal on 24.7.2014. No application was made to include the said document as part of the record of appeal and no explanation was given why it was not filed together with the supplemental record of appeal.
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> For the above reasons, I rule that the record of appeal is incomplete and therefore defective. In the circumstance, it is tantamount to no record of appeal being filed.

[14] Since the notice of appeal was filed by the appellant on 20 November 2015, the last date for filing the record of appeal was on or before 20 December 2015.

[15] It is common ground that the appellant filed his record of appeal after 20 December 2015 and served on 4 January 2015 upon the respondent without the leave of the court obtained through an application for an extension of time. Hence, the appellant's appeal is plainly in breach of O. 55 r. 5(3) of the Rules of Court 2012. In the absence of an application for an extension of time, there is also no testamentary explanation before the court on the appellant's delay in filing and serving his record of appeal.

[16] The appellant sought to rely on O. 1A of the Rules of Court 2012 to excuse his breach of the Rules by reason that there was no substantial failure of justice that has occurred following *Hock Seng Construction Sdn Bhd & Anor v. Yeoh Poh Owi & Anor* [2001] 4 CLJ 1. Order 1A reads as follows:

> Regard shall be to justice (O. 1A)
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> In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.

[17] Apposite to that, the respondent referred to the Court of Appeal case of *Kerajaan Negeri Pahang Darul Makmur & Anor v. Seruan Gemilang Makmur Sdn Bhd* [2008] 6 CLJ 611 where Hasan Lah JCA (now FCJ) held as follows:

> [15] In the instant case the reason given by the applicants for not filing the record of appeal within time was that they could not file the record of appeal earlier because they had to amend the case number in the notice of appeal. Their application to the High Court to amend the case number was made on 9 July 2007 and on 6 August 2007 the application was dismissed by the High Court. Only on 1 October 2007 the applicants filed this application to this court.
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> [16] *We were of the view that the explanation given by the applicants for the failure to file and serve the record of appeal within the required time could hardly be described as an acceptable explanation for the delay. What the applicants should have done was to file the record of appeal first and then applied for the amendment after that. As such the applicants should not have waited for the amendment to be made first before filing their record of appeal.*
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> [17] A more serious ground for refusing the applicants' application was that nothing was mentioned about the merits of appeal in their affidavit-in-support. They did not mention the factual circumstances surrounding the cause of action leading to the order appealed against. It would had been sufficient if they had at least exhibited the statement of claim and the statement of defence in their affidavit-in-support so as to give the basis for their counsel to submit on the merits of their appeal. *It is trite that in an application for extension of time to file record of appeal the applicants have to show that they have at least an arguable case in their appeal.* (emphasis added)

[18] The respondent nevertheless candidly referred to another Court of Appeal case of *Cergas Tegas Sdn Bhd (In Liquidation) v. SAP Holdings Sdn Bhd & Anor* [2013] 8 CLJ 745 where the Court of Appeal accepted the explanation of the delay in filing the record of appeal beyond the prescribed time because

of the solicitor's fault pursuant to an application for an extension of time. However the point remains that there was an application for an extension of time and the court was also satisfied that there is merit in the appeal as revealed in the affidavits filed pursuant to the extension of time application.

[19] The appellant himself also referred to the case of *Kemajuan Hunda Kredit (Kuching) Sdn Bhd v. Titus Chuo Mui Ing* [1995] 2 CLJ 102; [1995] 2 MLJ 542 but that case did not assist the appellant by reason that the court therein dismissed the application for an extension of time. Again the point is that there was an application made for an extension of time.

[20] The pivotal consideration here is whether O. 1A can be utilised to excuse the appellant in the absence of an application for an extension of time to file the record of appeal. I think not. In my view, O. 1A deals with situations of non-compliances where no specific remedy is provided in the Rules. Thus, O. 1A has been successfully utilised for example in *Abd Hamid Jaafar v. Shamsiah Dan Keluarga Sdn Bhd* [2004] 5 CLJ 381 where there was failure to state in the affidavit that the deponent reads and understand English and in *Re MTD Infraperdana Bhd* [2003] 7 CLJ 108 where the application was made by summons in chambers instead of summons for directions.

[21] As for non-compliances with the prescribed time fixed in the Rules, O. 3 r. 5 of the Rules of Court 2012 clearly provides as follows:

> 5. Extension of time (O. 3 r. 5)
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> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.
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> (2) The Court may extend any such period as referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
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> (3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent in writing without an order of the Court being made for that purpose.

[22] Consequently, it is my view a mandatory requirement for the appellant to make an application for the extension of time here to regularise the late filing and service of his record of appeal. Since this has not been done, it is fatal to the appeal. It cannot be saved by O. 1A. This is confirmed by the cases cited by the parties where they were all preceded by an application for an extension of time.

[23] As to the second objection that the notice of appeal has been further amended without leave of the court, I think the consequence would be to expunge those contents in the notice that have been inserted without leave.

[24] In the premises, I uphold the preliminary objections of the respondent and that would *ipso facto* result in the dismissal of the appeal.

[25] Accordingly, it is strictly speaking unnecessary for me to delve into the appellant's further arguments that the default judgment was irregularly obtained and that there are merits in the defence to justify the setting aside of the default judgment. I will nonetheless briefly deal with them for completeness.

Default Judgment Irregularly Obtained

[26] Firstly, the appellant has contended that the default judgment has been irregularly obtained because the writ was not properly served by the respondent on the appellant in accordance with O. 10 r. 3(1)(b) of the Rules of Court 2012. However as per the respondent's reply, I agree that the appellant's contention is misconceived. It is clearly provided in cl. 8 of the guarantee as follows:

> I/We FURTHER AGREE that my/our obligations hereunder shall be binding on my/our personal representatives and any demand made by you hereunder shall be validly made if served on me/us personally or sent to me/us by pre-paid ordinary post to or left at my/our address stated below or to or at my/our business or private address or that last known to you and if sent by post shall be conclusively deemed to have been received by me/us within forty eight hours after time of posting.

[27] It is also common ground that the respondent sent the writ by pre-paid registered post to the last known address of the appellant as indicated in the letter sent by the appellant to the respondent dated 15 September 2014. I am of the view that by the common sense approach and purposive construction of cl. 8 encompass the service of legal process and I draw support from the following *dicta* of Badariah Sahamid JCA in the Court of Appeal case of *Noraini Abu Bakar v. Amislamic Bank Bhd; Oh Siew Kuen (Third Party)* [2015] 1 LNS 1155:

> [39] One of the issues raised by the Defendant is that the service of the Originating Summons and cause papers is irregular and defective as there is no contractual clause to provide for the mode of service of the Originating Summons and cause papers in compliance with Order 10 rule 3(1) (b) of the Rules of Court 2012.
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> [40] Order 10 rule 3(1) (b) of the Rules of Court 2012 provides as follows:
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> Service of writ in pursuance of contract
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> 3. (1) Where:
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> (b) **the contract provides** that, in the event of any action in respect of the contract being begun, the process by which it is begun may be served on the defendant, or on such other person on

his behalf as may be specified in the contract, in such manner or at such place (whether within or out of jurisdiction) as may be so specified. (emphasis added)

[42] While section 9 of the PPA refers to "Any notice request or demand", but does not refer specifically to Originating Summons and cause papers. **A common sense approach is that the address for service contractually provided would be extended to other relevant documents, including Originating Summons and cause papers**. (emphasis added)

[28] Consequently and contrary to the appellant's allegation, the writ was in my view properly served and the default judgment was regularly entered.

Disclosure Of Defence On The Merits

[29] Secondly, the appellant contended that even if the default judgment was regularly obtained, there are merits in the appellant's defence to warrant the judgment to be set aside; see *Evans v. Bartlam* [1937] AC 473 and *Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat* [1978] 1 LNS 15; [1979] 1 MLJ 23. In the respect, the appellant contended that the hire purchase facility is arguably non Syariah compliant because the documentation was incomplete: notably the absence of the asset purchase agreement as well as the asset sale agreement. In this case there was only a stand alone hire purchase agreement which did not make it *al-ijarah thumma al-bai* compliant.

[30] In *PL Construction Sdn Bhd v. Abdullah Said* [1988] 2 CLJ 808; [1988] 2 CLJ (Rep) 91; [1989] 1 MLJ 60, Zakaria Yatim J (later FCJ) held that "a defence on the merits" means a defence that discloses a triable and arguable issue. I take judicial notice that the respondent being one of the biggest commercial banks in the country which has Islamic banking licenses issued by the Ministry of Finance to transact in Islamic banking services. That notwithstanding, I find the appellant's contention of incomplete documentation to be a bare allegation without the expert opinion in Islamic finance in support thereof. It is seen in *CIMB Islamic Bank Bhd v. Tengku Kamarul Zaman* [2011] 1 LNS 1539 that the hire purchase arrangement therein was enforceable based only on a Hire-Purchase-i Agreement. In that case, Mohd Zawawi Salleh J (now JCA) held as follows:

[16] Hiring and leasing are used interchangeably in the literature (Bakar, 2000). In the present day, *ijarah* has been developed into a more innovative financing facility, widely known as *ijarah wa-iqtina'*. In Malaysia, *ijarah wa-iqtina'* is commonly known as *al-ijarah thumma al-bai'*, which is abbreviated in the commercial practice as AITAB. It combines a lease contract and sale contract in one trading document, but the contract of leasing and sale work separately: first, the contract of leasing will operate whereby the lessee will pay monthly rental to the lessor within a fixed period. Upon expiry of the leasing or rental period, the hirer has the option to enter into a second contract to purchase the goods from the

owner at an agreed-upon price. In the event, the purchase price will be determined according to the value of the goods, market condition, and necessary profit to the bank. Hence, AITAB involves three main parties: customer, financing company, and vendor. Using, for the sake of illustration, the common example of motor vehicle financing, AITAB operates as follows:

(a) finance company buys the vehicle from vendor or car dealer, to the order of customer;

(b) finance company rents the vehicle to the customer at a rate agreed upon for a specified period of time;

(c) the customer (hirer) agrees to pay for road tax and insurance coverage. He also will be responsible for its maintenance; and

(d) at the end of the period, the finance company and the customer will sign the sale and purchase agreement,

(see Seif I. Tag El-Din and N. Irwani Abdullah, *Issues of Implementing Islamic Hire Purchase in Dual Banking Systems: Malaysia's Experience*, Thunderbird International Business Review, Vol. 49(2), at page: 226-228).

[17] **The same had been applied in the transaction between the Plaintiff and the Defendant herein as evidenced by the execution of the HPA**. It must be noted that there is no specific Act on the Islamic Hire Purchase in Malaysia. As long as the subject matter includes any good specified in the First Schedule of the Hire-Purchase Act, 1967 (Revised 1978) ("Act 212") such as in this case, the respective transaction shall be governed by the same Act. (emphasis added)

[31] Hence, it is my view that the appellant's contention here is hollow and plainly inadequate to demonstrate that he has a meritorious defence.

[32] Thirdly, the appellant contended that the respondent did not execute the hire purchase agreement in breach of cl. 22 thereof which reads:

This Agreement shall not commence unless and until it has been signed by or on behalf of the Owner and the Hirer has paid any deposit required by law.

As the result, the appellant argued that the hire purchase contract is a nullity.

[33] I find the argument to be devoid of merit. Notwithstanding that the respondent has not executed on the hire purchase agreement, it was nonetheless performed and Iltizam Kukuh Enterprise had enjoyed the benefit of the hire purchase facility. The legal consequence here is simply that the respondent has waived that provision designed to protect its interest. It could never have been a nullity otherwise that would instead result in unjust enrichment on the part of Iltizam Kukuh Enterprise.

Conclusion

[34] For the foregoing reasons, I therefore dismiss the appeal with costs of RM4,000.